Supreme Court, U.S.
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No. 00-243

IN THE
SUPREME COURT OF THE UNITED STATES

Alexander S. McMath, an individual,
Petitioner,

v.

Alva M. Montgomery, an individual;
Patsy Patterson, an individual, and
The Estate of Clarence C. Montgomery,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Alexander S. McMath files the following Reply Brief in response to Respondent's Brief in Opposition:

Preliminary Statement

Respondent would argue that this Court's decision, in *New York State Conference of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645 (1995), effectively foreclosed further conflict between and among the circuits over the issue of preemption of state substantial compliance rules under 29 U. S. C. § 1144 (a) , arguing that the Fourth and Tenth Circuits' decisions in *McMillan v. Parrot*, 913 F.2d 310 (6th Cir. 1990) and *Phoenix Mutual Life Ins. Co. v. Adams*, 30 F.3d 554 (4th Cir. 1994), predated *Travelers*, and the prospect of further conflict is nonexistent. Pgs. 5-6. Respondent's Opposition (undated).

As a factual matter, the circuit conflict has continued post-*Travelers*, as cited in the Petition, and was recently exacerbated by the Fifth Circuit's entry into the conflict as represented in the recent holding in *Manning v. Hayes*, 212 F.3d 866, 870 (5th Cir. Tex. 2000).

The Fifth Circuit Joins the Conflict

In response to the Respondent's argument that the conflict between and among the circuits over the preemption of state substantial compliance rules ended with *Traveler's*, it must be pointed out that the Ninth Circuit's decision in *Fortis Benefits Ins. Co. v. Johnson*, 966 F.Supp. 987 (D.C. Nev. 1997), *affirmed*, 152 F.3d 925 (9th Cir. Nev. 1998), was post-*Traveler's*, and was subsequently cited with approval by the Seventh Circuit's Northern District Court for the Eastern

Division in *Continental Assur. Co. v. Coombes*, 2000 U.S. Dist. LEXIS 810 (Nos. 98-C-1153, 98-C-4771, 98-C-7186) for the proposition that "ERISA preempts the state doctrine of substantial compliance." Pg. 6, 2000 U.S. Dist. LEXIS 810.

And, more to the point, the conflict is continuing. In the recent holding by the Fifth Circuit in *Manning v. Hayes*, *supra*, the Fifth Circuit was confronted with an ERISA beneficiary designation dispute requiring interpretation of Texas state law governing changes of beneficiaries and stated as follows:

> There is no doubt that Manning's claim on behalf of the estate is preempted, to the extent that it relies upon the Texas beneficiary redesignation statute. Almost every circuit court to consider the issue, including this one, has determined that a state law governing the designation of an ERISA beneficiary "relates to" the ERISA plan, and is therefore preempted. See: *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606, 611 (5th Cir. 1999); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1325 (5th Cir. 1994), see also: *Metropolitan Life Ins. Co. v. Pettit*, 164 F.3d 857, 862 (4th Cir. 1998); *Mohamed v Kerr*, 53 F.3d 911, 913 (8th Cir. 1995); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 15 (2nd Cir. 1993); *Metropolitan Life Ins. Co. v. Hanslip*, 9349 F.2d 904, 906 (10th Cir. 1991); *Brown v. Connecticut General Life Ins. Co.*, 934 F.2d 1193, 1195 (11th Cir. 1991); *McMillan v. Parrot*, 913 F.2d 310, 311 (6th Cir. 1990); *Fox Valley & Vicinity Const. Workers Pension Fund*, 897 F.2d 275, 278

(7th Cir. 1989). But see: *Emard v. Hughes Aircraft Co.*, 153 F.3d 949, 961 (9th Cir, 1998) (holding that ERISA does not preempt California construction trust or community property law in a dispute between a surviving and former spouse over life insurance benefits), *cert. denied sub nom.* 525 U.S. 1222, 119 S.Ct. 903, 142 L.Ed.2d 902 (1999) *Ibid.* at 870.

CONCLUSION

Accordingly, in view of the vigorous conflict that continues to pertain among and between the circuits respecting the preemption of state substantial compliance/ beneficiary designation laws, it cannot be contended, that the Ninth Circuit's decision is not a "decision in conflict with the decision of another United States Court of Appeals on the same matter." S.C. Rule 10.1(a). And, for the foregoing reason, therefore, this petition for writ of certiorari should be granted.

Dated: September 21, 2000

Respectfully submitted,

/s/_____

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